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Nos. 97-826, 97-829, 97-830, 97-831

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
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And Related Cases

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

OPPOSITION OF THE REGIONAL BELL COMPANIES TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in giving States authority to "establish" and "determin[e]" the rates for local interconnection arrangements (47 U.S.C. § 252(c), (d)) and in providing that "nothing in this Act shall be construed . . . to give the [Federal Communications] Commission jurisdiction" with respect to intrastate matters (*id.* § 152(b)), Congress foreclosed the FCC's claim of jurisdiction to regulate the rates and certain other terms of local interconnection arrangements.

2. Whether the court of appeals correctly applied *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), in holding that FCC rules requiring incumbent telephone companies to provide their competitors with preassembled combinations of "unbundled network elements" that amount to a finished telecommunications service could not be reconciled with statutory text providing that unbundled network elements must be provided "in a manner that allows *requesting carriers* to combine such elements" (47 U.S.C. § 251(c)(3) (emphasis added)) and with separate statutory provisions governing the resale of finished telecommunications services (*id.* § 251(c)(4)).

3. Whether the court of appeals correctly applied *Chevron* in holding that FCC rules allowing a competitor to force upon an incumbent carrier any isolated provision from any of the incumbent's approved interconnection agreements could not be reconciled with the Act's reliance on voluntary private negotiations and with statutory text providing that incumbent carriers must make such provisions available to other carriers only "upon the same terms and conditions" as in the original agreement (47 U.S.C. § 252(i)).

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit are reproduced at Pet. App. 1a-4a, 73a-78a, and 92a.

Pursuant to Supreme Court Rule 29.6, the parties to this brief submit the following statement concerning parent companies and non-wholly owned subsidiaries:

Ameritech Corporation has no parent companies and no non-wholly owned subsidiaries.

Bell Atlantic Corporation has no parent companies. It owns the following subsidiaries having securities in the hands of the public: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Financial Services, Inc., New York Telephone Company, New England Telephone and Telegraph Company, NYNEX Credit Company, NYNEX Capital Funding Company. In addition Bell Atlantic has the following non-wholly owned subsidiaries: One Parkway, Inc., ICA Foreign Financial, Inc., Chesapeake Directory Sales Company, Atlantic West B.V., Grupo Iusacell, S.A. de C.V., Bell Atlantic New Zealand Holdings, Inc., PrimeCo Personal Communications, L.P., Washington, D.C. SMSA Limited Partnership, New York SMSA Limited Partnership, Upstate Cellular Network, Orange County Poughkeepsie MSA Limited Partnership, Pittsfield Cellular Telephone Company, Allentown SMSA Limited Partnership, Reading SMSA Limited Partnership, Pittsburgh SMSA Limited Partnership, Pennsylvania RSA No. 6(II) Limited Partnership, Columbia Cellular Telephone Company, Anderson Cellular Telephone Company, Las Cruces Cellular Company, TELE-TV, TELE-TV Media, L.P., TELE-TV Systems, L.P., NYNEX Master Lease Partners, Global Directory Services Company, MEDIATEL spol. s.r.o., Zlate Stranky MEDIATEL spol. s.r.o., Greek Directory Services Company, NIMCO Commercial

Societe Anonyme of Publication of Directories and of Information Services, Polish Directory Services Company, NYNEX Worldwide Directories Company, Kipling Associates L.L.C., NYNEX International (Asia) Ltd., and Gibraltar NYNEX Communications Limited.

BellSouth Corporation has no parent companies. BellSouth Corporation's non-wholly owned subsidiaries are 1155 Peachtree Associates, InfoVentures of Atlanta, Beijing Ji Tong—Bellsouth Communication & Information Engineering Co., Ltd., Compania de Radiocommunicaciones Moviles S.A., Telcel Celular C.A., Tele 2000, S.A., RAM Mobile Data Belgium, S.C.S., RAM Mobile Data C.V., RAM Mobile Data Limited, BellSouth Carolinas PCS, L.P. (d/b/a BellSouth Mobility DCS), Bloomington Cellular Telephone Company, Chattanooga MSA Limited Partnership, Decatur RSA Limited Partnership, Florida RSA #2B (Indian River) Limited Partnership, Georgia RSA No. 1 Limited Partnership, Georgia RSA No. 2 Limited Partnership, Georgia RSA No. 3 Limited Partnership, Gulf Coast Cellular Telephone Company, Huntsville MSA Limited Partnership, Lafayette MSA Limited Partnership, Los Angeles Cellular Telephone Company, Louisiana RSA No. 7 Cellular General Partnership, MCTA, Muncie Cellular Telephone Company, Inc., Orlando SMSA Limited Partnership, Richmond Cellular Telephone Company, and Terre-Haute Cellular Telephone Company, Inc.

SBC Communications, Inc., which has shares outstanding in the hands of the public, is the parent company of Southwestern Bell Telephone Company and Southwestern Bell Yellow Pages, Inc. SBC Communications Inc. has the following non-wholly owned subsidiaries which have shares or partnership interests outstanding in the hands of the public: Abilene SMSA Limited Partnership, Amarillo SMSA Limited Partnership, Buffalo Telephone Company, Cellular Mobile Corporation, Champaign CellTelco, Dallas SMSA Limited Partnership, Decatur Cellular Telephone Company, Inc., Eastern Missouri Cellular Limited

Partnership, Gainesville Development Associates Limited, Gary Cellular Telephone Company, Kansas City SMSA Limited Partnership, Lubbock SMSA Limited Partnership, McAllen/Edinburgh SMSA Limited Partnership, Midland-Odessa SMSA Limited Partnership, Missouri RSA 8 Limited Partnership, Missouri RSA 9 B1 Limited Partnership, Oklahoma City SMSA Limited Partnership, Oklahoma RSA 3 Limited Partnership, Oklahoma RSA 9 Limited Partnership, PTF/FCLC Associates (LP), PTF/GECC (California) Associates (LP), San Antonio SMSA Limited Partnership, SBMS Cellular Telecommunications Bloomington, Inc., SBMS Cellular Telecommunications Springfield, Inc., S.T.L.M. Programming Services Limited, St. Joseph SMSA Limited Partnership, Texas RSA 9B4 Limited Partnership, Texas RSA 10B1 Limited Partnership, Texas/ Illinois Cellular Limited Partnership, Topeka SMSA Limited Partnership, Washington/Baltimore Cellular Limited Partnership, Wichita SMSA Limited Partnership, and Worcester Telephone Company.

On April 1, 1997, SBC Communications Inc., Pacific Telesis Group ("PAC"), and SBC Communications (NV) Inc., a wholly owned subsidiary of SBC Communications Inc., completed an agreement and plan of merger by the means of which PAC and SBC Communications (NV) Inc. were merged into PAC, and PAC became a wholly owned subsidiary of SBC Communications Inc. PAC, formerly a publicly held corporation, and its wholly owned subsidiaries, Pacific Bell and Nevada Bell, provide telecommunications services subject to the general jurisdiction of the Federal Communications Commission.

U S WEST, Inc., has no parent company. Financial Security Holdings, Ltd. is a non-wholly owned subsidiary of U S WEST, Inc.

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OPPOSITION OF THE REGIONAL BELL COMPANIES TO PETITIONS FOR A WRIT OF CERTIORARI

Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, SBC Communications Inc., and U S WEST, Inc., petitioners below, respectfully oppose the petitions for a writ of certiorari.

Despite the tortuous complexity of the underlying FCC regulations, this case presents, at bottom, only ordinary issues of statutory construction like those the courts of

appeals routinely resolve every day. The Eighth Circuit, relying on the plain text of the Telecommunications Act of 1996 (the "1996 Act") and adhering scrupulously to the principles of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), correctly resolved each of these questions and, notwithstanding petitioners' claims to the contrary, there is no circuit conflict as to any aspect of the court's decision.

Nor is there any substance to petitioners' wholly unsupported assertion that the Eighth Circuit's ruling has had catastrophic effects on local competition. Petitioners direct their principal challenge to the court of appeals' jurisdictional holding that the FCC could not, consistent with the governing statutory language and with this Court's decisions, dictate to States the pricing rules for local interconnection arrangements. But in the 14 months since the court of appeals stayed the FCC's intrusive pricing rules, the States have aggressively and successfully implemented the Act's local competition provisions—issuing some 200 arbitration decisions and supervising more than 1,700 interconnection agreements. They have done so, moreover, in a manner compatible with the FCC's own notions of desirable policy. By the FCC's own account, "*virtually every state in the union* has adopted [the FCC's pricing] policies." [1]

The other questions presented by petitioners—which bear no relationship to the jurisdictional issue—deal only with the details of the statute's "unbundling" and most-favored-nation provisions. These second-level statutory issues fall far short of this Court's usual threshold for certiorari.

STATEMENT OF THE CASE

1. Background. For over 60 years, since the enactment of the Communications Act of 1934, Congress has expressly confined the FCC's jurisdiction to interstate and

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[1] Reed Hundt, Chairman, Federal Communications Commission, remarks to the Chamber of Commerce, Washington, D.C. (May 29, 1997) (as prepared for delivery) (emphasis added).

foreign communications and has reserved for the States exclusive jurisdiction over intrastate communications. Section 2(b) of the Act provides (with exceptions not relevant here) that "*nothing* in this Act shall be construed to apply *or to give the Commission jurisdiction* with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier," 47 U.S.C. § 152(b) (emphasis added). This Court has squarely held that section 2(b) "fenc[es] off from FCC reach or regulation intrastate matters," and that only an "unambiguous" and "straightforward" grant of specific intrastate jurisdiction to the FCC can "override the command of [§ 2(b)]." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370, 377 (1986).

Prior to the current decade, most States exercised their federally guaranteed authority over local telephone service by granting exclusive franchises in each local service area and pervasively regulating these franchised "local exchange carriers" (or "LECs") with an eye to securing affordable "universal service." To keep prices low even for high-cost customers, the States mandated an extensive system of interservice subsidies under which LECs were typically required to charge below-cost rates for basic residential service and above-cost rates for business and other services. The level and structure of these subsidies naturally varied throughout the country depending on each State's local conditions and prevailing social policies.

Interservice subsidy arrangements were economically sustainable only because the States preserved certain legal barriers to entry that prevented competitors from cherry-picking LEC business customers whose above-cost rates fund universal service. In the years leading up to the 1996 Act, however, a number of States began to depart from the exclusive franchise model. Far from being "complicit[]" in preserving "monopolistic local markets" (MCI Pet. 7), these States took the lead in the difficult and inherently localized process of opening up local telephone markets to competition while still ensuring affordable,

high-quality service to all consumers. *See Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 427 n.7 (8th Cir. 1996).

2. The 1996 Act. Building significantly on the work already done by the States, Congress crafted in the 1996 Act a "pro-competitive, de-regulatory national policy framework" designed to "open[] all telecommunications markets to competition." S. Conf. Rep. No. 104-230, at 113 (1996). With respect to local service markets, Congress expressly preempted all State and local legal barriers to entry, such as exclusive franchises. *See* 47 U.S.C. § 253(a). It also required incumbent carriers, on reasonable terms, to interconnect their local networks with the facilities and equipment of competing local carriers, to provide access to elements of their networks on an unbundled basis, and to offer their retail services to competitors for resale at wholesale rates. *Id.* § 251(c).

Recognizing, however, that these steps implicated the intensely local concerns of 50 different jurisdictions—each with its own system of rate structures, regulations, and subsidies—Congress enlisted the aid of State public utility commissions to ensure that local competition would be implemented fairly and with due regard to local conditions. Congress saw the States, *not* as obstructionists to be kept "on a short leash" (MCI Pet. 7), but as critical players in a pro-competitive enterprise.

Congress chose to rely in the first instance on private party negotiations to reach interconnection agreements consistent with the 1996 Act. But where the parties are unable to agree on all issues within a prescribed bargaining period, Congress provided that either party may petition the State commission "to arbitrate any open issues." 47 U.S.C. § 252(b)(1). Most significantly for present purposes, the Act entrusts solely to State commissions the resolution of disputes concerning the crucial question of pricing. It provides that "*a State commission* shall . . . establish any rates for interconnection, services, or network elements," in accordance with the pricing standards spelled out in the statute. *Id.* § 252(c)(2) (emphasis added).

Congress did provide for ultimate federal oversight of State arbitrations, but it chose a judicial, not an administrative, mechanism for this oversight. Once an arbitrated agreement has been finally approved by a State commission, any aggrieved party may bring an action in federal district court to determine whether the decision "meets the requirements of section 251 and [section 252]." *Id.* § 252(e)(6).

In contrast to its broad reliance on private negotiations, State-supervised arbitrations, and federal judicial review, Congress assigned the FCC a specifically delimited role in implementing the Act's local competition provisions. The statute provides that, if a State commission declines to carry out its responsibilities under section 252, the FCC "shall assume the responsibility of the State commission . . . with respect to the proceeding or matter." *Id.* § 252(e)(5). Otherwise, with a few tightly drawn exceptions,[2] Congress scrupulously avoided authorizing the FCC to intrude on the States' traditional jurisdiction exclusively to oversee intrastate telephone service. In particular, Congress gave the FCC *no* responsibilities with respect to the pricing of interconnection arrangements.

3. The FCC's Order. Unwilling to accept its circumscribed role under the new statute, the FCC moved aggressively to transform the deregulatory, State-centered plan Congress enacted into a comprehensive federal regulatory program. In its First Report and Order—a 700-page, 3,200-footnote opus (selected excerpts of which are reproduced at Pet. App. 131a-337a)—the Commission undertook to promulgate "uniform, national rules" ad-

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[2] For example, Congress gave the FCC "exclusive jurisdiction" over the administration of "telecommunications numbering," including the responsibility to make numbers available "on an equitable basis." 47 U.S.C. § 251(e)(1). It also gave the FCC a role in defining a carrier's duty to provide "number portability," *id.* § 251(b)(2); in determining what network elements should be unbundled, *id.* § 251(d)(2); in prescribing permissible resale restrictions, *id.* § 251(c)(4)(B); and in providing for the treatment of comparable carriers as "incumbents," *id.* § 251(h)(2).

dressing every conceivable local interconnection issue (*id.* at 166a), and it declared those rules "binding on the states, even with respect to intrastate issues" (*id.* at 201a). Although the FCC conceded that the 1996 Act "do[es] not contain an explicit grant of intrastate authority to the Commission" (*id.* at 191a), it nevertheless proclaimed that it had authority "without limitation" (*id.* at 213a) to issue such binding rules because, in its view, the "1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act." *Id.* at 144a. As the FCC's Chairman declared in plainer terms, the 1996 Act tossed the States' traditional intrastate authority into "the trash can of history." [3]

Having asserted unconstrained intrastate authority, the FCC turned its attention to the pricing of local interconnection arrangements. Even though section 252(d) expressly assigns to "State commission[s]" the authority to determine "just and reasonable" rates, the FCC asserted that it nonetheless has jurisdiction to adopt "national pricing rules" and to relegate the States to the subordinate role of mechanically applying those rules. Pet. App. 191a, 210a. The Commission accordingly mandated a new pricing methodology known as "total element long run incremental cost" (or "TELRIC"), which required States to set prices based solely on the incremental, forward-looking cost of a hypothetical, ideally efficient network. *Id.* at 147a. The Commission also required States to apply FCC-prescribed rates (known as "proxy" prices) in all instances where TELRIC studies had not been completed. *Id.* at 147a-48a.

The FCC's Order also contained rules on a wide array of other matters. Two are relevant here.

First, the Commission dismantled the statute's carefully tailored distinction between access to an incumbent carrier's unbundled network elements—which must be priced at "cost" plus "a reasonable profit" (47 U.S.C.

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[3] Interview with FCC Chairman Reed Hundt, *in* Telecommunications Report, Supplement at 10 (July 9, 1996).

§ 252(d)(1))—and the provision of finished services for resale—which must be priced at the incumbent's "retail rates" less "avoided" costs (*id.* § 252(d)(3)). The FCC ruled that a competitor could purchase at cost-based rates all the elements necessary for the provision of a complete service—and could require the incumbent to provide those elements in *pre-combined form.* Pet. App. 230a-33a, 242a-49a. The FCC's rules therefore allowed a competitor to obtain a finished service at cost-based, unbundled-element rates simply by framing its request in different terms: instead of requesting the incumbent's retail service for resale at wholesale rates under section 251(c)(4), the competitor could simply invoke section 251(c)(3) and demand, in fully preassembled form, all the "unbundled network elements" needed to provide that retail service.

Second, the FCC transformed the 1996 Act's unexceptional most-favored-nation requirement—under which an incumbent must make available to requesting carriers, "upon the same terms and conditions," any interconnection arrangement contained in an approved agreement (47 U.S.C. § 252(i))—into an extreme "pick-and-choose" rule that subverts voluntary negotiations and undermines binding agreements. Under the FCC's Order, a competitor may pluck any isolated provision from any approved interconnection agreement, and may force it upon the incumbent carrier without any obligation to accept the other "terms and conditions" negotiated as part of the same agreement. Pet. App. 261a-62a. Furthermore, a competitor may unilaterally revise even a signed, State-approved agreement by "avail[ing] itself of more advantageous terms and conditions subsequently negotiated by any other [competitor]." *Id.* at 265a.

In a separate order in the same proceeding, the FCC asserted power to dictate to the States the terms and conditions for implementing intrastate "dialing parity"—a system that allows callers to choose a carrier other than their local telephone company without dialing extra digits. *See* 47 U.S.C. §§ 153(15), 251(b)(3). The FCC asserted this power even though Congress directed the

States, not the FCC, to implement dialing parity for intrastate toll calls. *See id.* § 271(e)(2)(B).

4. The Stay Proceedings. Numerous States, as well as many incumbent carriers, petitioned for review of the FCC's Order. Pursuant to 28 U.S.C. § 2112(a)(3), the petitions were consolidated in the Eighth Circuit.

Because the FCC's arrogation of pricing jurisdiction seemed so clearly to usurp authority that Congress granted to the States, a number of States, as well as some private petitioners, sought an interim stay of the FCC's rules pending judicial review. After full briefing and argument, the Eighth Circuit granted the requested stay in October 1996 because of "what appear[ed] to be the rather clear and direct indication [in the statutory text] that the state commissions"—not the FCC—"should establish prices." *Iowa Utils. Bd.*, 109 F.3d at 424.

Making the same arguments that they now present in their petitions for certiorari, the FCC, AT&T, and MCI applied to Justice Thomas to vacate the stay. Justice Thomas denied the applications. 117 S. Ct. 378; 117 S. Ct. 379 (1996). The FCC immediately reapplied to Justice Ginsburg, and AT&T and MCI reapplied to Justice Stevens. The renewed applications were referred to the full Court, which likewise refused to vacate the stay. 117 S. Ct. 429 (1996).

5. The Decision Below. After further briefing and oral argument, the court of appeals confirmed that the language of the 1996 Act "plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." Pet. App. 14a. Section 252, the court held, "clearly assign[s] jurisdiction" over pricing to the States. *Id.* at 22a. If there were "[a]ny ambiguity," however, it would be resolved by the intrastate jurisdictional proscription of section 2(b), because "the prices that incumbent local exchange carriers may charge their new competitors for interconnection, unbundled access,

and resale . . . qualify as 'charges . . . for or in connection with intrastate communications service.'" *Id.* at 15a.

The Eighth Circuit also addressed a lengthy series of additional challenges to specific FCC rules.[4] Of relevance here, the court determined two respects in which the Commission's rules conflicted with the terms of the statute.

First, the court vacated the FCC's "pick-and-choose" rule because it "conflict[ed] with the Act's design to promote negotiated binding agreements" and was therefore "an unreasonable construction of the Act." *Id.* at 25a, 27a.

Second, the court held that "the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased . . . on an unbundled basis . . . cannot be squared with the terms of subsection 251(c)(3)" (*id.* at 52a), which states that "requesting carriers" are to "combine such elements" to provide telecommunications services. In light of that holding, the court concurrently rejected the incumbents' contention that new entrants cannot obtain access to all of the network elements that, when combined by the requesting carrier, are sufficient to provide service. *Id.* at 54a-58a. Because entrants must make an "up-front investment" and incur additional "costs and risks" in combining the elements themselves, the Eighth Circuit reasoned, recombining all the elements needed to provide a complete service would not simply be resale under another name. *Id.* at 56a-57a.

AT&T and others immediately sought to sidestep the Eighth Circuit's ruling on the issue of combining network elements. Citing the court's failure to vacate a particular subsection of the FCC's rules (47 C.F.R. § 51.315(b))—which provided that, "[e]xcept upon request, an incum-

[4] Because it vacated the FCC's pricing rules on jurisdictional grounds, the Eighth Circuit found it unnecessary to reach additional claims that those rules were arbitrary and capricious, contrary to the statute, and confiscatory.

bent [carrier] shall not separate requested network elements that the incumbent [carrier] currently combines" (Pet. App. 294a)—AT&T argued in proceedings around the country that it could still skirt the resale pricing rules by obtaining at cost-based prices a "platform" of all the necessary network elements already combined into a complete service by the incumbent.

Once it was alerted to these attempted evasions of its ruling, the Eighth Circuit granted rehearing and vacated the FCC rule at issue as inconsistent with the plain statutory text. The court stated that "§ 251(c)(3) does not permit a new entrant to purchase the incumbent [carrier's] assembled platform(s) of combined network elements"; indeed, if that were allowed, it would "obliterate the careful distinctions Congress has drawn" between resale and unbundled elements. Pet. App. 71a.

In a separate appeal that was briefed and argued independently of the main appeal and that the court decided in a separate opinion, the Eighth Circuit concluded that the FCC lacked jurisdiction to issue mandatory rules governing the States' implementation of "intraLATA toll [*i.e.*, short-haul long-distance] dialing parity." Pet. App. 81a-89a. The court of appeals relied on the express language of section 271(e)(2)(B)—which "indicates that state commissions, not the FCC, have the authority to issue intraLATA dialing parity rules" (Pet. App. 88a)—as well as on this Court's analysis of section 2(b) in *Louisiana PSC*.

ARGUMENT

Each of the issues raised by petitioners is a straightforward matter of statutory construction on which the decision below was plainly correct. But even if there were doubt on that score, the issues would not warrant further review. There is no reason to believe that the court of appeals misunderstood its role under this Court's *Chevron* decision. Petitioners' claims of conflict with respect to individual decisions are so strained as to undermine their credibility. And their assertions that the decision below

has had adverse practical consequences are without foundation; indeed outside of litigation, petitioners themselves have frankly admitted as much.

The Eighth Circuit did not invalidate any part of the 1996 Act, but merely read it to vindicate the States' historical authority over intrastate matters, to preserve the Act's careful distinction between resale and unbundled elements, and to retain the role of voluntary negotiations in reaching interconnection agreements. These statutory rulings—among the many made by the court below—are but the first wave in what will unavoidably be a long series of decisions interpreting this new statute, each of which will have its own claims to importance.

The 1996 Act was enacted less than two years ago by a Congress, most of whose members remain in place. If the Eighth Circuit erred in reading that statute, Congress is in the best position to apply a remedy. There is no reason for this Court to play the role of Special Master in attempting to resolve each such dispute that might arise.

I. THE EIGHTH CIRCUIT'S JURISDICTIONAL RULINGS WERE CORRECT, REST ON THE PLAIN LANGUAGE OF DISCRETE STATUTORY PROVISIONS, AND RAISE NO ISSUE OF NATIONAL IMPORTANCE

The Eighth Circuit did not make a single, sweeping jurisdictional ruling. It made a series of discrete rulings concerning the scope of the FCC's authority to regulate numerous separate aspects of local interconnection arrangements. And, although each of these decisions was reinforced by section 2(b), each turns principally and in the first instance on the proper reading of individual provisions of the 1996 Act.

The most important of these jurisdictional rulings concerns the FCC's attempt to appropriate the State's authority to determine prices. We therefore focus primarily on the pricing issue in the discussion below. The separate oppositions of USTA/RTC and the mid-size LECs—

which also deserve close attention—discuss other jurisdictional rulings that are likewise encompassed within the first question presented in the FCC's petition.

The fact that there is not one jurisdictional issue—but a series of such issues implicating dozens of specific statutory provisions—should weigh heavily in the Court's consideration of whether to grant certiorari. By lumping all these issues under a single heading, petitioners try to create the impression that the Eighth Circuit has issued a core jurisdictional ruling that transcends in importance the proper interpretation of individual statutory provisions. But, as even a cursory review of its opinion shows, the court carefully parsed numerous individual statutory provisions to reach a succession of narrow, and perfectly correct, decisions concerning the 1996 Act's allocation of regulatory jurisdiction between the States and the FCC. These rulings raise no general legal issue, conflict with no other circuit court decisions, and have had no adverse effect on implementation of the 1996 Act. Further review is not warranted.

a. The 1996 Act could hardly be clearer in its assignment of pricing authority. Section 252(c)(2) provides that a "*State commission* shall . . . establish any rates for interconnection, services, or network elements according to subsection (d)" (emphasis added). Section 252(d)(1), entitled "Pricing Standards," in turn specifies that "[d]eterminations by a *State commission* . . . of the just and reasonable rate[s]" for interconnection and network elements shall be "based on the cost . . . of providing" those services and may include a "reasonable profit" (emphasis added). Likewise, section 252(d)(2) specifies that "a *State commission*" shall determine whether a carrier's reciprocal compensation arrangements are just and reasonable, and subsection (d)(3) provides that "a *State commission* shall determine wholesale rates" for resale of an incumbent's retail services (emphasis added). In stark contrast, *no* subsection of section 251 or 252 that discusses pricing even mentions the FCC, much less suggests that

the federal agency has been given authority over these rates.

There is no basis for the FCC's assertion (Pet. 15) that Congress intended to give the States only ministerial powers in a scheme in which the FCC prescribes detailed and binding "methodological" rules. Congress itself enacted the governing "Pricing Standards" in section 252 (d)(1) and assigned to State commissions the task of "establish[ing]" and "determin[ing]" "just and reasonable rates" consistent with those standards. 47 U.S.C. § 252(c), (d). The responsibility to "establish" and "determine" rates in accordance with the statutory standards plainly subsumes the "methodological" function wrongly arrogated by the FCC.[5]

Moreover, as the Eighth Circuit explained (Pet. App. 13a-14a), the structure of section 252(c) strongly bolsters the conclusion that Congress did not intend the States to be subservient to the FCC on pricing matters. Section 252(c) contains a clear dichotomy. Subsection (c)(1) provides that, when States arbitrate matters within the bounds of the FCC's concurrent jurisdiction (such as the availability of unbundled network elements or resale restrictions), they must ensure that the result meets both "the requirements of section 251" *and* "the regulations prescribed by the [FCC] pursuant to section 251." Subsection (c)(2), by contrast, addresses pricing as a separate matter and makes *no* reference to any FCC rules. It provides only that States shall "establish rates . . . *according to subsection (d)*" (emphasis added)—that is, according to the pricing standards set forth in section 252(d). Thus, Congress itself prescribed the standards that State commissions must follow, and it made clear that,

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[5] In any event, the agency did not stop at creating detailed pricing methodologies; it also adopted specific "proxy prices" that it instructed the States to apply in all instances where they had not completed TELRIC studies. Pet. App. 147a-48a.

with respect to the specific issue of pricing, the States need look only to the statute, not to any FCC rules.[6]

b. The Eighth Circuit correctly concluded that the plain language of section 252 is itself sufficient to preclude the FCC's seizure of pricing jurisdiction. Pet. App. 14a, 22a. It also correctly recognized, however, that if there were "[a]ny ambiguity" that it would be resolved by section 2(b). Pet. App. 15a.[7]

As this Court has held, section 2(b) is a "br[oad]" and "sweeping" "congressional *denial* of power" to the federal agency that "fences off from FCC reach or regulation intrastate matters." *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 370, 373, 374. That provision bars implied federal jurisdiction—the FCC can assert regulatory authority over intrastate matters only if Congress uses language "so unambiguous or straightforward as to override the command of [section 2(b)]." *Id.* at 377. Section 2(b) thus operates both as a substantive limit on FCC authority and as a specific "rule of construction" (*id.* at 373) that necessarily defeats the FCC's claim to *Chevron* deference here (FCC Pet. 16).

Petitioners can point to nothing sufficiently "unambiguous or straightforward" to overcome the plain directive of section 2(b). On the contrary, the FCC has *conceded*

[6] If the FCC were correct that States were required to follow the FCC's pricing rules under section 252(c)(1), Congress would have had no reason to instruct States separately in subsection (c)(2) to establish rates under the standards of subsection (d). *See Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997) (statute should not be read to render a provision redundant). Moreover, section 252(c)(1) refers only to "regulations prescribed by the Commission pursuant to section 251." The Act's substantive pricing standards are in section 252(d), not section 251.

[7] It is therefore wrong to characterize the section 2(b) analysis as "central to" and "underlying all of" the court's jurisdictional holdings. AT&T Pet. 13. The court rested its pricing decision on the plain terms of section 252; it invoked section 2(b) only as supplementary, not as necessary, support. Yet, all of petitioners' claims of conflict—which themselves are meritless—bear solely on section 2(b) and not at all on the meaning of section 252.

that the 1996 Act "do[es] not contain an explicit grant of intrastate authority to the Commission." Pet. App. 191a. As a consequence, petitioners must argue that section 2(b) has no bearing here. *See* FCC Pet. 18-22. But their arguments are unavailing.

Petitioners contend initially that, because sections 251 and 252 *apply* to intrastate matters, these sections must also give the FCC *jurisdiction* over such matters. But that argument simply misreads the statute. Section 2(b) provides that, in the absence of express contrary direction, nothing in the Act "shall be construed to apply *or* to give the Commission jurisdiction with respect to" intrastate matters. Even if a particular statutory provision expressly "appl[ies]" to intrastate matters, therefore, section 2(b) independently forecloses the FCC's exercise of "jurisdiction" over such matters.

Petitioners alternatively contend that section 2(b) is irrelevant because the same facilities used to provide local telephone service are also used for interstate access services. FCC Pet. 19-23; AT&T Pet. 13-16. As a result, petitioners claim, it would not be "practicable" for the FCC to confine its jurisdiction, as the Act requires, to interstate matters. FCC Pet. 20. The short—and conclusive—answer to this argument is that the *FCC never even mentioned it* in its 700-page First Report and Order. It is well-established that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1993).

In any event, the argument plainly proves too much. Under petitioners' logic, the FCC would have had jurisdiction to impose all of the intrastate regulations at issue in this case, based entirely on its jurisdiction over *interstate* communications, *even before* Congress adopted the 1996 Act. This Court rejected essentially the same extravagant assertion of federal power in *Louisiana PSC*. The FCC there sought to substitute its own nationally uniform depreciation rules for those of the States on the theory

(echoed almost verbatim here) that the telephone equipment at issue was used for both interstate and intrastate calls and that "it makes no sense within the context of the Act to depreciate one piece of property two ways." 476 U.S. at 375. But, observing that "virtually *all* telephone plant that is used to provide intrastate service is also used to provide interstate service" (*id.* at 360 (emphasis added)), this Court *refused* to "confine[]" State regulation (as petitioners ask this Court to do) "to intrastate matters which are separable from and do not substantially affect interstate communication" (*id.* at 373 (internal quotation marks omitted)).

After *Louisiana PSC,* the courts of appeals have consistently rejected similar FCC arguments in other contexts. The settled rule is that preemption may "*not* be justified merely by the dual intrastate and interstate aspects of [a particular service]; the FCC [has] to show that it [can]not separate the interstate and intrastate components of its regulation." *Public Util. Comm'n of Texas v. FCC,* 886 F.2d 1325, 1333 (D.C. Cir. 1989) (emphasis added). To invoke this very limited exception, moreover, the FCC must also demonstrate "with some specificity" that a State's exercise of its intrastate authority makes it literally "impossib[le]" for the FCC to exercise "its own lawful authority over interstate communications." *NARUC v. FCC,* 880 F.2d 422, 429, 430 (D.C. Cir. 1989); *accord California v. FCC,* 905 F.2d 1217, 1243 (9th Cir. 1990).

No such showing has been made or even attempted here. Interconnection for the exchange of local calls, reciprocal compensation for the transport and termination of such calls, and resale of an incumbent's existing local services—the subjects of large portions of the FCC's pricing rules—are purely intrastate matters that lie beyond the FCC's jurisdictional reach even under the agency's own theory. And far from being powerless to regulate interstate aspects of the use of unbundled elements, the FCC has continued to issue regulations governing the

interstate charges that incumbents may levy. *See Competitive Telecom. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (upholding FCC rules on payment of access charges by purchasers of network elements).

c. In an attempt to evade the clear language of sections 252 and 2(b), petitioners resort to a grab-bag of ambiguous, general provisions. Petitioners lean most heavily on section 251(d)(1), which states that "[w]ithin 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." *See* FCC Pet. 11-12, 17-18. That provision merely directs the FCC—which has a history of multi-year rulemaking proceedings—to adopt within six months whatever rules are necessary to implement the requirements for which the FCC was given express responsibility under section 251. *See* Pet. App. 12a. Nothing in this wholly procedural provision confers any new *substantive jurisdiction* on the FCC, and certainly nothing in it overrides section 252's express grant of pricing authority to the States.

When Congress wanted to extend the agency's authority to intrastate matters, it did so explicitly. For example, in section 276 of the 1996 Act, Congress not only directed the FCC to prescribe payphone regulations within nine months, but *also* gave the FCC jurisdiction with respect to "each and every completed *intrastate and interstate* call," and expressly preempted any contrary state regulations. 47 U.S.C. § 276(b), (c) (emphasis added).[8]

Similarly, in the Cable Act (Pub. L. No. 102-385)—to which the FCC itself pointed as a jurisdictional analog in the court of appeals—Congress not only directed the

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[8] AT&T's claim (AT&T Pet. 20) of a "square conflict" between this case and *Illinois Pub. Telecom. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), simply betrays the weakness of AT&T's request for discretionary review by this Court. That case dealt with section 276, and it is the difference, not the similarity, between that provision and the one at issue here that is illuminating.

Commission to prescribe regulations within 180 days to carry out its responsibilities, but *also* expressly assigned the Commission substantive jurisdiction over the rates to be charged by cable systems (47 U.S.C. § 543(b)(1)(2)), and directed State regulators to follow the FCC's rate regulations. *Id.* § 543(a)(2)(A).

These provisions bring sharply into focus the missing links in the FCC's statutory argument. The 1996 Act assigns the FCC *no* substantive pricing jurisdiction. Instead, Congress entrusted pricing authority entirely to *State commissions.* 47 U.S.C. § 252(c), (d). Nor does the 1996 Act require States to follow any FCC pricing rules. On the contrary, as we have discussed, Congress went out of its way in section 252(c) to specify separately that States are to set rates only "according to subsection (d)."

Petitioners cannot avoid the clear assignment of pricing jurisdiction to the States by relying on the even more general language of section 201(b). Section 201(a) relates only to "interstate or foreign communication," and section 201(b) refers back to "such communication service"—a term that can only signify the same "interstate or foreign" service. Seeking to wrench the last sentence of section 201(b) from this context (FCC Pet. 12-13), petitioners suggest that this one sentence alone (which gives the FCC rulemaking authority to carry out its responsibilities under the Act) applies as well to *intra*state services—even though those services are nowhere mentioned in section 201. But statutory language must be read in context (*King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)), and the FCC's suggested reading is nonsensical. If an isolated sentence in a provision that deals only with interstate and foreign communications can be read to give the FCC authority over *all intrastate* matters under the Act, then Congress truly wasted its breath when it stated in section 2(b) that "nothing in [the Communications Act] shall be construed . . . to give the Commission jurisdiction with respect to" intrastate matters.

Nor do any of the other provisions petitioners cite confer pricing jurisdiction on the FCC. The Commission wrongly discerns in section 251(d)(2)—which suggests only that the FCC may determine "what network elements should be made available" by incumbent carriers—an implication that Congress intended tacitly to give the FCC plenary intrastate jurisdiction with respect to local interconnection. But no such implication can provide the straightforward or unambiguous authority necessary under *Louisiana PSC*. Similarly, section 251(d)(3)—which provides that the FCC "shall not preclude the enforcement of any regulation, order, or policy of a State" that is consistent with section 251—is an *anti-preemption* provision that actually contradicts the FCC's claim. It presumes that the States, not the FCC, have authority to adopt intrastate access and interconnection regulations, and it specifically protects those State regulations against FCC preemption. Finally, as the Eighth Circuit correctly ruled (Pet. App. 12a-13a, 85a-86a) and as other courts of appeals have consistently held, section 4(i) is merely a "necessary and proper" clause that confers no added jurisdiction. *See California v. FCC*, 905 F.2d at 1240 n.35; *AT&T v. FCC*, 487 F.2d 865, 877 (2d Cir. 1973).[9]

d. There is no substance to the FCC's assertion that, in vindicating the States' historical authority over intrastate matters, the Eighth Circuit's decision threatens to "impede" local competition. FCC Pet. 22. The FCC it-

[9] The same jurisdictional analysis applies to the dialing parity issue addressed in the Eighth Circuit's separate ruling. As in the lead case, the statutory language indicates that *States*, not the FCC, were to oversee intrastate dialing parity issues. *See* 47 U.S.C. § 271(e)(2)(B) (specifying the dates by which "a State" may or may not order dialing parity). Furthermore, the FCC was unable to show an unambiguous grant of jurisdiction sufficient to overcome section 2(b). Indeed, in a portion of its order omitted from AT&T's Appendix, the FCC expressly acknowledged that the interstate and intrastate aspects of dialing parity could easily be regulated separately. *See* Second Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 19392, 19414, ¶ 37 (1996).

self has acknowledged that "virtually every state in the union" has adopted pricing policies compatible with the FCC's own notions.[10] Thus, from petitioners' own perspective, this case amounts to little more than a fight about "who's ahead on some jurisdictional score sheet." [11]

Petitioners complain that it is inefficient to have these matters decided in individual State proceedings subject to federal district court review. But Congress deliberately chose to enact a decentralized scheme that respects the historical role and unique perspective of individual State commissions; it was not willing to turn State commissions into mere field offices of the FCC. As this Court made clear in *Louisiana PSC*, the FCC has no license to preempt State regulation merely because it believes that its own uniform national rules "will best effectuate [the] federal policy." 476 U.S. at 374.

In any event, the argument rests on a false assumption. There is no basis for petitioners' belief that the inevitable (or proper) result of this review process will be a single one-size-fits-all national mandate on every issue. The statute gives the States considerable latitude to make individual policy choices for their citizens within the bounds of the "Pricing Standards" set forth in section 252(d)(1). That is entirely appropriate in a federal system that acknowledges the differing concerns that may arise in different regions and that has for decades relied exclusively on States to set local telephone rates.

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[10] *See* n.1, *supra*. MCI and AT&T have echoed the point. MCI's Response to Motion for Summary Judgment, *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest*, No. A-97CA-132-SS, at 7 (W.D. Tex. June 16, 1997); *see also* AT&T's Reply Memorandum in Support of AT&T's Motion for Summary Judgment, No. A-97-CA-132-SS, *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest*, at 1-2 (W.D Tex. July 1, 1997).

[11] FCC Commissioner Rachelle Chong, *A Forest View from the Mystery Commissioner*, Remarks to the Communications Committee of the National Association of Regulatory Utility Commissioners (Feb. 26, 1997).

II. THE EIGHTH CIRCUIT'S GARDEN-VARIETY *CHEVRON* DETERMINATIONS ARE CORRECT, DO NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS, AND RAISE NO ISSUES OF NATIONAL IMPORTANCE

In addition to challenging the Eighth Circuit's jurisdictional rulings, petitioners contest the court of appeals' application of well-settled *Chevron* principles to several specific FCC determinations. The Eighth Circuit correctly decided each of these issues, and petitioners can make no claim of a circuit conflict as to the meaning of the statutory provisions in question. However the Court disposes of the jurisdictional issue, these unrelated tag-along issues plainly do not merit further review.

a. Petitioners first attack the Eighth Circuit's determination of what it means to provide access to "unbundled" network elements in a way that allows "requesting carriers" to "combine" those elements to provide a telecommunications service. 47 U.S.C. § 251(c)(3). This issue is not about whether incumbents may "discriminat[e]" against new entrants (MCI Pet. 15) or may engage in "destruction" of their networks (FCC Pet. 28). Rather, the question here is whether AT&T and MCI may evade the Act's resale pricing provisions and thereby subvert Congress's carefully balanced scheme for local entry.

i. Congress enacted two distinct mechanisms by which entrants may use incumbents' facilities to provide service. First, an incumbent must provide access to "network elements"—specific parts of the incumbent's network —"on an unbundled basis at any technically feasible point" and in a "manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3). In addition, an incumbent must "offer for resale at wholesale rates any telecommunications service that the [incumbent] carrier provides to subscribers who are not telecommunications carriers." *Id.* § 251(c)(4)(A).

Congress also provided different pricing mechanisms for these distinct modes of entry. The rates for unbundled network elements must be "based on the cost . . . of providing" those elements. *Id.* § 252(d)(1). In contrast, the wholesale rates for finished services must be determined "on the basis of the [incumbent's] retail rates charged to subscribers" minus only those costs that "will be avoided" by selling at wholesale. *Id.* § 252(d)(3).

This separate resale pricing rule provides crucial protection for both consumers and incumbents. Most jurisdictions require incumbents to charge below-cost rates for basic service (especially for rural and residential customers), and allow incumbents to offset those under-recoveries by charging above-cost rates to business and other customers. If new entrants—who, unlike incumbents, have no obligation to serve (and no interest in serving) these rural and residential customers—could obtain complete services at cost-based rates, they could easily siphon away the incumbents' valuable business customers, not by providing a better or lower cost service, but simply by undercutting the above-cost rates that incumbents must charge to subsidize their other services. Such regulatory arbitrage would lead to massive pressure on basic service rates and enormous losses for incumbents. By pegging resale prices to *retail* rates, Congress sought to preserve whatever contribution retail rates make to defray the cost of below-cost services. *See* H.R. Rep. No. 104-204, at 72 (1995) ("The [resale] rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services . . . .").

Ever since Congress passed the 1996 Act, however, AT&T and MCI have continually tried to avoid this crucial pricing restriction, insisting that they can obtain the equivalent of a complete service for resale simply by demanding all of the incumbent's combined network elements at cost-based rates. AT&T's President has openly admitted that this gives competitors simply *"another way to resell"*—one that results in discounts of "52 percent" or

more, in contrast to State-determined resale discounts in the range of 15-25 percent.[12]

The FCC's rules facilitated these attempts to circumvent the resale pricing rules. They (1) permitted entrants to pay cost-based network element rates even when the entrant wants to rely exclusively on the incumbent's network elements to recreate an existing end-to-end service, *and* (2) allowed entrants to obtain network elements *already combined* by the incumbent, so that the entrant need do no work to combine the elements into a finished service but instead can simply order the incumbent's finished service in the form of a preassembled combination of network elements. *See* Pet. App. 230a-33a, 242a-49a.

Although incumbent LECs challenged both of those determinations, the Eighth Circuit sustained those challenges only in part. In a ruling barely mentioned by petitioners, the court of appeals concluded that entrants could obtain, at cost-based rates, all the elements necessary to reproduce an existing retail service. Pet. App. 53a-58a.[13] Recognizing that it must avoid rendering the resale pricing provision superfluous, however, the court tied its ruling on this issue to its prior determination that the FCC could not lawfully require incumbents to combine these "unbundled" elements on behalf of new entrants. *Id.* at 52a-53a. As the Court explained, "requiring the requesting carriers to combine the elements themselves" ensures that entrants bear "the costs and risks associated with unbundled access" and do not simply engage in resale by another name and at another price. *Id.* at 56a-57a.

Despite that holding, AT&T and other competitors continued to argue in proceedings across the country that they were entitled to demand a fully preassembled "plat-

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[12] Transcript, AT&T Investment Community Meeting (Mar. 3, 1997) (comments of John Zeglis) (emphasis added).

[13] The parties to this brief intend to file shortly a Conditional Cross-Petition on this issue.

form" of unbundled network elements—the equivalent of an end-to-end service—at cost-based rates. They pointed to the Eighth Circuit's failure to vacate a subsection of the FCC's rules prohibiting an incumbent from "separating" elements that it "currently combines." 47 C.F.R. § 51.315(b) (Pet. App. 294a).

When the issue was brought to the Eighth Circuit's attention on rehearing, the court vacated section 51.315(b) for the same reasons that it had already vacated sections 51.315(c)-(f). The court explained that, like these other provisions, section 51.315(b) (at least as then-interpreted by the FCC, AT&T, and MCI) was inconsistent with the express terms of the statute, which provides that "requesting carriers" are to "combine" unbundled elements. Pet. App. 70a-71a. The rule also made the separate statutory resale provisions meaningless:

> To permit such an acquisition of already combined elements at cost based rates or for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other.

Id. at 71a.

ii. The Eighth Circuit's analysis does not warrant further review. As an initial matter, there is no basis for petitioners' suggestion that the court's decision conflicts with the decisions of other courts of appeals. No other court has decided whether section 51.315(b) of the Commission's rules conflicts with the language and structure of the 1996 Act. Indeed, no other court has even ruled upon the scope and meaning of section 251(c)(3)'s requirement that incumbents provide new entrants with "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point."

Given the absence of any direct conflict, petitioners attempt to argue that the term "unbundled" has been used

in other regulatory contexts to refer only to separate prices. FCC Pet. 26-27; MCI Pet. 17-18; AT&T Pet. 23-24. But, once again, this argument was never made in the FCC's Order. Indeed, it is flatly inconsistent with what the FCC actually said in the Order, where it read the "unbundling" requirement of section 251(c)(3) to mean that "incumbent LECs must provide [new] carriers with the functionality of a particular element, *separate* from the functionality of other elements, *and* must charge a separate fee for each element." Pet. App. 225a (emphasis added). In other words, just as the court of appeals held, each unbundled network element must not only bear a separate fee, but also must actually be separated from other elements.

The text of section 251(c)(3) is not susceptible to any other reading. Congress spoke of providing "*access* to network elements on an unbundled basis at any *technically feasible point*" and in a "manner that allows *requesting carriers* to *combine* such elements." 47 U.S.C. § 251(c)(3) (emphasis added). Petitioners cannot square their argument with that language. As petitioners understand unbundling, there is no need to obtain "access" at any point because they can obtain supposedly "unbundled" elements already combined into a complete service. Even more obviously, as the Eighth Circuit emphasized, petitioners' claim that they may demand access to already combined elements collides with Congress's express statement that the "requesting carrier[]" itself, not the incumbent, is expected to combine the incumbent's unbundled elements.

The Eighth Circuit's conclusion on this point, moreover, is fortified by the language of related statutory provisions. Under the 1996 Act, incumbents must permit "physical collocation"—that is, installation of a competitor's equipment on the incumbents' premises—"for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). Congress would have had no need to require physical collocation for this purpose if unbundling were merely a pricing concept.

The Eighth Circuit's ruling is also consistent with the 1996 Act's scheme for local competitive entry. By taking the language of subsection (c)(3) at face value—and thus requiring a new entrant to undertake real work and investment to construct or fill in its own network based on the incumbent's unbundled network elements—the court of appeals preserved the crucial distinction between access to unbundled network elements under section 251(c)(3) and resale under section 251(c)(4). The Eighth Circuit's decision was thus based not on a mere "policy rationale" (MCI Pet. 19), but rather on the court's duty to "'give effect, if possible, to every clause and word'" that Congress enacted. *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997) (quoting *United States v. Menasche*, 348 U.S. 528, 538 (1955)).[14]

iii. Petitioners' position is not strengthened by their hyperbolic claims of harm. As petitioners well know, incumbents are fully prepared to allow them access to the incumbents' complete networks with all elements combined. All AT&T and MCI have to do is ask. That service, however, is known as resale, and resale rates apply. Alternatively, if AT&T and MCI want parts of the incumbents' networks, they can have that too. They simply have to undertake the work necessary to combine the network elements themselves. In sum, the only "harm" here is to a few companies' ability to undermine the Act.

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[14] It is no answer to this point to suggest vaguely that there are differences in the risks associated with the use of unbundled elements and those related to resale. The simple fact—admitted by AT&T's own witnesses—is that when an entrant purchases combined network elements, it simply uses different words in asking for the service. *See, e.g., Interconnection Agreement Negotiations*, Docket No. 96-AD-559 (Miss. PSC Feb. 10, 1997), Transcript at 25 (Testimony of Joseph Gillan) (AT&T witness answers "that is true" when asked whether, under AT&T's theory, "you could call up BellSouth and say . . . I want to order all of the component elements, we won't go through [the] process of unbundling and rebundling. I'll just order all the elements that make up that service and you charge me the unbundled network element cost").

That is why new entrants with their own competing local facilities oppose the position taken by MCI and AT&T here. As one competitor stated, the Eighth Circuit "made the right decision": those demanding that incumbents reassemble network elements for new entrants are part of a "rear-guard action being fought by the big long distance carriers to essentially get in there and not have to make any investment."[15] Another facilities-based competitor echoed the point: true local competitors "owe[] a debt of gratitude to the Eighth Circuit. . . . The fact that there will be no free ride for interexchange carriers seeking a cheap method of local market entry is a plus for our industry."[16]

In any event, the FCC's General Counsel stated just last month that there was "no reason" that State commissions could not act under their own authority to require incumbents to provide combined network elements.[17] AT&T and MCI have urged State commissions to do just that.[18] Although we vigorously disagree with these assertions, they show that the extent to which petitioners may ultimately obtain what they seek will be determined in future litigation. Until that question of State authority is resolved, the legal issue here will not be settled and the effect of the Eighth Circuit's ruling on entrants will not be finally known.

Moreover, the FCC relied upon section 51.315(b), prior to its vacatur, to support new regulations requiring

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[15] Communications Daily, at 2 (Dec. 10, 1997) (quoting Royce Holland, Chairman of Allegiance Telecom).

[16] Telecommunications Reports, at 18 (Nov. 10, 1997) (quoting James Allen, CEO of Brooks Fiber Properties, Inc.).

[17] Communications Daily, at 3 (Nov. 20, 1997) (statement of Christopher Wright).

[18] *See, e.g.*, Initial Post Argument Brief of AT&T Communications of Illinois, Inc., ICC Dkt. No. 96-0486, at 5 (Nov. 3, 1997); Post Oral Argument Reply Brief of MCI Telecommunications Corp., ICC Dkt. No. 96-0486, at 8 (Nov. 10, 1997).

incumbents to provide what the Commission called "shared transport"—which actually is a preassembled combination of most of the network elements in the incumbent's network.[10] The FCC's "shared transport" regulations are currently on review before the Eighth Circuit, and the court's decision in that case will determine in large measure the practical effect of its earlier decision vacating section 51.315(b).

In short, petitioners are not only wrong on the law; by their own account, they are premature in bringing this issue to this Court.

b. Finally, petitioners contest the Eighth Circuit's invalidation of the FCC's "pick-and-choose" rule, which precluded effective negotiation of binding agreements by allowing new entrants "to choose among individual provisions contained in publicly filed interconnection agreements" without accepting the other terms of that agreement. Pet. App. 261a.

The Eighth Circuit correctly held that the statute requires nothing like that bizarre result. Section 252(i) provides only that an incumbent LEC "shall make available" in the negotiating process "any interconnection, service, or network element" that it provides under an approved agreement with any other carrier "*upon the same terms and conditions* as those provided in the agreement" (emphasis added). Contrary to petitioners' claim (FCC Pet. 29), that text establishes a straightforward nondiscrimination principle: An incumbent must put on the bargaining table for negotiation any item contained in another agreement, but *only* on the "same terms and conditions"—all the same tradeoffs—that appear in that other agreement. That ensures that a second entrant can step into the shoes of an earlier one if it wishes to accept the

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[10] *See* Third Order on Reconsideration, *Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (Aug. 18, 1997).

deal that the earlier one has struck. It certainly does *not* mean that the second entrant can take what it likes from a prior agreement and leave behind what it doesn't like.

As the FCC would have it, a competitor may demand for itself a new term from another agreement at *any* time, even after it has already signed a different contract with the incumbent. But, as this Court has recognized, a contract that gives one party unfettered discretion " 'to deny or change the effect of the promise[] is an absurdity.' " *United States Trust Co. v. New Jersey,* 431 U.S. 1, 25 n.23 (1977) (quoting *Murray v. Charleston,* 96 U.S. 432, 445 (1878)). An agency rule that reads a statute to require such a result is equally absurd, especially in the context of a statute that expressly relies on private negotiation to establish "binding agreement[s]." 47 U.S.C. § 252(a)(1).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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